IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PRESS ROBINSON; EDGAR CAGE; DOROTHY NAIRNE; EDWIN RENE SOULE; ALICE WASHINGTON; CLEE EARNEST LOWE; DAVANTE LEWIS; MARTHA DAVIS; AMBROSE SIMS; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE LOUISIANA STATE CONFERENCE, also known as NAACP; POWER COALITION FOR EQUITY AND JUSTICE, Plaintiffs—Appellees, versus KYLE ARDOIN, in his official capacity as SECRETARY OF STATE FOR LOUISIANA, Defendant—Appellant, CLAY SCHEXNAYDER; PATRICK PAGE CORTEZ; LOUISIANA ATTORNEY GENERAL JEFF LANDRY, Intervenor Defendants—Appellants,EDWARD GALMON, SR.; CIARA

Case No. 22-30333

HART; NORRIS HENDERSON; TRAMELLE HOWARD,
Plaintiffs— Appellees,
versus KYLE ARDOIN, in his official capacity as SECRETARY OF STATE FOR LOUISIANA,
Defendant—Appellant,
CLAY SCHEXNAYDER; PATRICK PAGE CORTEZ; LOUISIANA ATTORNEY GENERAL JEFF LANDRY, Movants—Appellants.

STATEMENT/BRIEF OF PROFESSOR JAMES F. BLUMSTEIN AS *AMICUS CURIAE*

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Statement Pursuant to Federal Rules of Appellate Procedure, Rule 29(a)(4)

1. This proposed Amicus Statement/Brief is intended to support the appellants in this appeal. Amicus' Statement/Brief supports vacating the decision of the District Court and remanding for factfinding and analysis in accordance with the analytical structure and doctrinal requirements of *Chisom v. Roemer*, 501 U.S.380, 396 – 98 (1991).
2. *Amicus* is not a corporation. He is a law professor at Vanderbilt Law School with a longstanding interest and involvement in the area of voting rights. Professor Blumstein's credentials are provided in greater detail at pages 2-5 of the Motion For Leave to File Statement/Brief as *Amicus Curiae*. As set forth in the Motion for Leave, Professor Blumstein believes that his background and perspective on the Voting Rights Act will be of assistance to the Court as it considers this appeal. This *Amicus* Statement/Brief is filed *pro se*, so there is no need to reference a separate source of authority to file.
3. Professor Blumstein is the sole author of this Statement/Brief; no party's counsel authored this Statement/Brief in whole or in part.
4. No party or party's counsel contributed money that was intended to fund the preparing or submitting of this Statement/Brief.
5. No person other than *Amicus* has contributed money intended to fund preparation or submission of this Statement/Brief. Professor Blumstein has received research

support from Vanderbilt Law School for his work in the area of voting rights; and Professor Blumstein has received logistical/secretarial support from Vanderbilt Law School in preparing this Statement/Brief in accordance with normal support of faculty research and public interest activities. The views and opinions expressed in this Statement/Brief reflect the views and analysis of Professor Blumstein, not Vanderbilt Law School, Vanderbilt University, or any other institutions or entities.

ARGUMENT

I. SECTION 2 OF THE VOTING RIGHTS ACT DOES NOT SUPPORT A FREESTANDING CLAIM OF VOTE DILUTION

In its recent decision involving Section 2 of the Voting Rights Act (VRA), *Allen v. Milligan*[1], the Supreme Court upheld a district court preliminary injunction that invalidated Alabama's Congressional districting plan. The Supreme Court held that the district court "faithfully applied our precedents and correctly determined that, under existing law, [the Alabama Congressional districting plan] violated §2."[2] An additional majority-minority district was ordered, based on a theory of vote dilution.

[1] 143 S. Ct. 1487 (2023) [pinpoint page cites to Slip Opinion].
[2] Slip Op. at 15.

In his opinion for the Court, Chief Justice Roberts asserted that the litigation was "not about the law as it exists," but "about Alabama's attempt to remake our §2 jurisprudence anew."[3] And, relying on "statutory *stare decisis*,"[4] the Court "decline[d] to recast… §2 case law."[5] The Court labeled its decision "a faithful application of our precedents" and discounted concerns that its decision "impermissibly elevate[d] race in the allocation of political power."[6]

The case to which the Court in *Allen* pledged allegiance was *Thornburg v. Gingles*,[7] the first Supreme Court case to interpret the 1982 amendment to section 2 of the VRA.[8] Amended section 2(a) bars the imposition of any "standard, practice, or procedure" that "results in a denial or abridgement of the right ... to vote."[9] Although the term "vote dilution" does not appear in amended section 2, the Court in *Gingles* held that amended section 2 applied to substantive claims of vote dilution.

[3] Id.
[4] Id. at 31.
[5] Id. at 16.
[6] Id. at 34. For an explanation that *Allen* did not require the remaking of Voting Rights Act, section 2, jurisprudence, see *infra* at note 71.
[7] 478 U.S. 30 (1986).
[8] Brnovich v. Democratic National Committee, 141 S. Ct. 2321, 2333 (2021)("This Court first construed the amended §2 in *Thornburg v. Gingles*," a "vote dilution case.") For an extensive discussion of amended Section 2 of the VRA, see James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act,* 69 VA. L. REV. 633 (1983) [hereinafter Defining and Proving Race Discrimination].
[9] 52 U.S.C. §10301(a).

Amended section 2(b) explains when a "denial or abridgement has occurred"[10] – "when, 'based on the totality of circumstances,' a State's electoral system is 'not equally open' to members of a racial group."[11] And, under section 2(b), a system is not equally open if members of one race "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[12] Plaintiffs must demonstrate that electoral "devices result in unequal access to the electoral process."[13] *Gingles* relied on the "elect representatives of choice" provision of section 2(b) to hold that section 2 is violated under a vote dilution theory[14] where an "electoral structure operates to minimize or cancel out" minority voters' "ability to elect their preferred candidates."[15]

Under *Gingles*, there are three prerequisites or thresholds that a plaintiff must establish in order to make out a claim (*e.g.*, a large, compact, politically cohesive minority community, racially polarized voting).[16] Once the threshold prerequisites are established, the analysis turns to the actual application of amended Section 2 – to determine, under the totality of circumstances, "whether the political process is

[10]Brnovich v. Democratic National Committee, 141 S. Ct. 2321, 2358 (2021) (Kagan, J., dissenting)
[11] Id.
[12] 52 U.S.C. §10301(b).
[13] Gingles, 478 U.S. at 46
[14] Chisom v. Roemer, 501 U.S. 380, 407- 08 (1991) (Scalia, J., dissenting).
[15] Gingles, 478 U.S. at 48.
[16] Cooper v. Harris, 581 U.S. 285, 301-02 (2017).

equally open to minority voters."[17]

VRA Section 2(b) was derived from *White v. Regester*.[18] *Regester* was a case in which minority communities, Blacks and Hispanics, were foreclosed from participation in the political process and were thereby deprived of an opportunity to elect their representatives of choice. The Court in *Gingles* treated this "totality of circumstances" analysis as a factual matter and affirmed the trial court under typical "clear error" deference to trial court factfinding.[19] There is very little substantive analysis of the underlying "totality of circumstances" doctrine in *Gingles*.[20] And much of the caselaw post-Gingles, including in the recent Alabama case (*Allen*),[21] has focused on the *Gingles* threshold preconditions and whether or how they apply in certain circumstances – *e.g.*, whether they apply to single-member districts, not

[17] Wisconsin Legislature v. Wisconsin Elections Commission, 142 S. Ct. 1245, 1248 (2022)(*per curiam*)(internal cite omitted).

[18] 412 U.S. 755 (1973). See Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1418 (1983)(section 2(b) "carried forward the *White v. Regester* test"); see also Chisom v. Roemer, 504 U.S. 380, 397 (1991)(amended section 2(b) is "patterned after the language used … in *White v. Regester*… and *Whitcomb v. Chavis*"); *Allen v. Milligan*, Slip Op. at 5 (section 2(b) "borrowed language from … *White v. Regester*").

[19] Gingles, 478 U.S. at 79. See also LULAC v. Perry, 548 U.S. 399, 427 (2006)("The District Court's determination whether the §2 requirements are satisfied must be upheld unless clearly erroneous").

[20] *Cf.* Allen v. Milligan, (Thomas, J., dissenting) (Dissent Slip Op. at 35)(noting that the Court has "never succeeded in translating the *Gingles* framework into an objective and workable method of identifying the undiluted benchmark").

[21] Slip Op. at 10-15.

just multi-member districts.[22]

But *Gingles* does not address or answer the critical question – whether a claim of substantive vote dilution is freestanding, or whether it is contingent on or linked to other process-based values as set out in amended section 2(b).[23]

As explained in section 2(b), the critical focus of section 2 is that a prerequisite (a "key requirement")[24] for finding a violation of VRA section 2 is that "the political processes leading to nomination and election … must be 'equally open' to minority and non-minority groups alike."[25] As the Court held in *Brnovich v. Democratic National Committee*, the term "open" means that the political process must be

[22] See Growe v. Emison, 507 U.S. 25 (1993) (holding that the *Gingles* prerequisites apply to vote dilution challenges to single-member districts). See also Abbott v. Perez, 138 S. Ct. 2305 (2018) (focusing on the *Gingles* pre-conditions).

[23] In the recent Alabama case (*Allen*), for example, plaintiffs' claims were expressed in what appears to be a freestanding form: "Black voters 'have less opportunity' than other Alabamians 'to elect representatives of their choice to Congress." Singleton v. Merrill, 582 F. Supp.3d 924, 953 (N.D. Ala. 2022). That formulation does not address the pivotal question and even camouflages it by suggesting that section 2 looks to substantive outcomes instead of lack of equal access to the political process that can cause adverse substantive outcomes such as vote dilution. The plaintiffs' formulation derives from Abbott v. Perez, 138 S. Ct. at 2315. The formulation in *Abbott* derives from LULAC v. Perry, 548 U.S. 399 (2006), which stated the issue under the totality of circumstances analysis as "whether members of a racial group have less opportunity than do other members of the electorate." Id. at 425-26. Section 2(b) links opportunity to participate in the political process and ability to elect representatives of choice; inability to elect is actionable but only upon a finding of unequal opportunity to participate in the political process. These claims are not freestanding but are "inextricably linked" and form a "unitary" claim under section 2(b). See Chisom v, Roemer, 501 U.S. 380, 396-98 (1991).

[24] Brnovich, 141 S. Ct. at 2237.

[25] Id

"without restrictions as to who may participate."[26] In dissent in *Brnovich*, Justice Kagan echoed the importance of – even the centrality of – "the right to an equal opportunity to vote."[27]

This raises the question of the relationship between the two critical provisions in section 2(b) and the twin requirements for establishing a violation of section 2: (i) that members of a racial minority "have less opportunity than other members of the electorate to participate in the political process" "and"[28] (ii) that members of a racial minority have less ability "to elect representatives of their choice." Is each provision and requirement separate and distinct? Or are they linked and therefore interdependent?

If the ability "to elect representatives of …. choice" provision, which undergirds the vote dilution claim, is freestanding, then some core value (otherwise undefined) must inform the meaning of the vote dilution concept.[29] After all, one

[26] Id. (internal cite omitted).
[27] Id. at 2351.
[28] In her *Brnovich* dissent, Justice Kagan erroneously uses the term "or" instead of "and," which is the statutory term, in relating the two pivotal provisions. Id. at 2358. See Chisom, 501 U.S. at 397 ("It would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and'").
[29] See Report of the Subcommittee on the Constitution to the Committee on the Judiciary on the Voting Rights Act, 97th Cong., 2d Sess. (Committee Print, April 1982) (the problem with a results test, as in the House version of amended section 2, is that "there is no core value… except for the value of equal electoral results for defined minority groups, or proportional representation. There is no other ultimate or threshold criterion by which a fact-finder can evaluate the evidence before it")

cannot sensibly think about whether something is "diluted" unless one has a benchmark of what an undiluted outcome would be.[30] In every-day terms, one cannot sensibly think about what it means to serve "watered down" (or dilutued) beer without having an understanding (a benchmark) of what non-watered-down beer would be.[31]

This set of concerns was the core criticism by critics of the "results" test as initially proposed and, as revised, adopted in amended section 2[32] – what was the

[30] *See*. *e.g.*, Holder v. Hall, 512 U.S. 874, 880 (1994)(plurality)(recognizing the need for a "benchmark against which to measure the existing voting practice" and that "where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under §2.")

[31] See Reno v. Bossier Parish School Bd., 520 U.S, 471, 480 (1997)("Because the very concept of vote dilution implies – and, indeed, necessitates – the existence of an 'undiluted' practice against which the fact of dilution may be measured, a §2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice").

[32] See Boyd & Markman at 1399, n.255 ("In the view of most critics of the proposed 'results' test, no alternative standard – except for proportional representation – made sense in the context of §2…. In their view, no alternative standard exists short of comparing actual representation of minorities to the representation that they would be ideally 'entitled' under a structure of proportional representation"). The Dole Compromise (section 2(b)) was developed and adopted to respond to these criticisms and concerns. See Boyd & Markman at 1414-20. I had expressed this set of concerns in testimony that I presented to the Subcommittee: "A substantive effects standard must imply either no theory at all or an underlying theory of some affirmative, race- based entitlements." The opposition to the "purpose" or "intent" standard derived not from a commitment to race-based entitlements but "really comes on the basis of pragmatism, that is, the problem of proof." 1 Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. On the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 1332, 1332-33 (testimony of Prof. James F. Blumstein)[hereinafter Blumstein testimony].

core value or benchmark, deviation from which could be established by a showing of effects alone?[33] "Did the 'ability to elect' component assure racial minorities, as a group, a right to group representation defined by race?"[34] Senator Dole, author of section 2(b) (called the Dole Compromise),[35] addressed the issue directly: "By the expression of an entitlement to 'elect representative their choice,' the amendment provides … that members of minority groups have a right to register, vote, and to have their vote fairly counted. There is no guarantee of success; just an equal opportunity to participate."[36] In a public mark-up session, Senator Dole reassured "results" skeptics "that revised Section 2 retained the Voting Rights Act's focus on discrimination against the rights of individuals to vote."[37]

In debate on the Senate floor, Senator Dole was "asked if revised Section 2 dealt with equal access to the voting process or with election results."[38] Senator Dole's response was definitive: "The focus in section 2 is on equal access, as it

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[33] Blumstein testimony at 1336 (the problem with the House's proposed substantive results or effects test "is that it does not make any theoretical sense unless you assume affirmative entitlements based upon race….")

[34] James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw v. Reno *in Doctrinal Context*, 26 RUTGERS L.J. 517, 567 (1995) [hereinafter Blumstein, Racial Gerrymandering]. See LULAC v. Perry, 548 U.S. 399, 437 (2006)("[T]he right to an undiluted vote does not belong to the 'minority as a group' but rather to 'its individual members'").

[35] Blumstein, Racial Gerrymandering, at 566 and note 294.

[36] 128 Cong. Rec. 14,316 (1982)(statement of Sen. Dole).

[37] Blumstein. Racial Gerrymandering at 568.

[38] Id.

should be…. It is not a right to elect someone of their race but it is equal access and having their vote counted."[39] As Senator Dole stated, "the essence of the Dole compromise was to draw a basic distinction between the issue of access to the political process and election results."[40]

That is, revised section 2 retained the focus on nondiscrimination against individuals, "on access to the process not on group entitlements to representation based on race."[41] The issue under revised section 2 is "whether minorities have 'equal access' to the political process," and "'[e]qual access' does not imply any right among minority groups to be elected in particular proportions: It does not imply a right to proportional representation of any kind."[42]

As part of the Dole Compromise, Section 2(b) itself specifically stated that a natural benchmark, racial proportionality, would be disavowed: "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[43] Subsequently, in *Johnson v. DeGrandy*,[44] the Supreme Court nixed another possible substantive benchmark –

[39] 128 Cong. Rec. 14,133 (1982).
[40] 128 Cong. Rec. 14,317 (statement of Sen. Dole).
[41] Blumstein, Racial Gerrymandering at 568.
[42] 128 Cong. Rec. at 14,317 (statement of Sen. Dole).
[43] 52 U.S.C. §10301(b). In my testimony, I was skeptical that a statutory disclaimer, such as a proposed anti-proportional representation provision "could get the job done when a willful court has its mind set to do something else." Blumstein Testimony at 1338.
[44] 512 U.S. 997, 1016-17 (1994). *DeGrandy* reinforces the point that the Dole

maximization of the political influence of Black voters (so-called Max Black).

"Purpose" or "intent" provided such a core value,[45] but revised section 2 relied on a "results" test. In the absence of some benchmark as a core value, a results test is analytically at sea. It "draws no bottom line. It requires the consideration of a laundry list of factors, but it never orients the inquiry. It demands a balance but it provides no scale."[46] A freestanding vote dilution claim, standardless statutorily,

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Compromise "confirms what is otherwise clear from the text of the statute, namely that the ultimate right of §2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." Id at 1014, n.11. *DeGrandy* also rejected a proposed "safe harbor" against a claim of racial vote dilution for states that achieved racial proportionality. In rejecting that proposal, the Court noted that such a safe harbor "would be in derogation of the statutory text and its considered purpose," which focus on "whether the political processes are 'equally open.'" Id. at 1018 (internal cite omitted). Amended section 2 focused on the openness of the political process; racially proportional electoral outcomes did not and could not insulate a state from a substantive vote dilution claim in the face of putative process-based claims, which relied on challenges to such "reprehensible practices as ballot box stuffing, outright violence, discretionary registration, property requirements, the poll tax, and the white primary" and other forms of race discrimination. Id.

[45] See Blumstein Testimony at 1333, noting the distinction between "discrimination" and "disadvantage' and the centrality of "purpose" in drawing thatdistinction.

[46] Blumstein, Defining and Proving Race Discrimination, at 644-45. There is a distinction between a "substantive" effects test and an "evidentiary" effects test. A substantive effects test suggests "an affirmative duty to consider race explicitly in effectuating an aliquot matching of a particular benefit to racial criteria." Id. at 650. In the voting context, a substantive effects test "would reflect adoption of an affirmative, race-based entitlement to representation; otherwise, notions such as … vote dilution are not understandable." Id. at 654. An "evidentiary effects analysis… offers an attractive alternative that accommodates legitimate concerns about problems of proof with the basic commitment to the principle of nondiscrimination." Id. at 658. There is an analogy to the doctrine of *res ipsa loquitur*. "Under res ipsa, the underlying theory of liability – negligence – remains the same; a plaintiff, however, can create an inference of negligence without directly showing that the defendant committed the negligent act."

would run the risk of developing a substantive benchmark that smacked of racial proportionality or some form of race-based representational entitlement.[47] A contingent, process-based core value – equal access to the political process – would provide an alternative as a core value or a benchmark.[48]

As it turns out, the Supreme Court has already confronted these issues, but the Court in *Allen* and the District Court in this case ignored or disregarded the critical case, *Chisom v. Roemer*,[49] that rejected a freestanding vote dilution approach, *contra* to the most far-reaching implications of *Gingles*. What was called for in *Allen* (and is called for in this appeal) was a clarification of the relationship between *Chisom* and *Gingles*, not an exclusive focus on *Gingles*.[50]

Chisom concerned the question whether VRA section 2 applied to judicial

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Id. at 659.

[47] *Cf.* LULAC, 548 U.S. at 437 ("The role of proportionality" is not to establish an affirmative, race-based claim to proportional representation but to "provide[] some evidence of whether 'the political processes leading to nomination or election … are…equally open to participation'")(internal cite omitted). That is, the focus of analysis under amended section 2 remains on nondiscriminatory access to the political or "electoral" process and the vote dilution that can result from that lack of access. Id. at 439-40.

[48] See Blumstein, Defining and Proving Race Discrimination at 702-03 (addressing "whether courts can resist the impetus towards a [substantive] result-based analysis– whether some analytically sensible way can be found to avoid the Scylla of a pure- race-based results approach and the Charybdis of intrusive and standardless judicial oversight of state and local political practices and institutions.")

[49] 501 U.S. 380, 396-98 (1991)

[50] *Cf. Allen*, slip op at 11 ("[T]he District Court concluded that plaintiffs' §2 claim was likely to succeed under *Gingles*" but did not analyze or even consider the impact of *Chisom* on the *Gingles* framework).

elections. The lower court construed section 2 as providing "two distinct types of protection for minority voters – it protects their opportunity 'to participate in the political process' and their opportunity 'to elect representatives of their choice.'"[51] Since judges were not "representatives," VRA section 2 did not apply to a freestanding vote dilution claim.

The Supreme Court rejected the position of the lower court. Section 2 embraces a "unitary claim,"[52] not "two separate and distinct rights."[53] The "opportunity to participate" and the "ability to elect" are "inextricably linked;[54] they cannot "be bifurcated into two kinds of claims."[55] The "inability to elect" component, upon which vote dilution claims rest, "is not sufficient to establish a violation [of section 2] unless, under the totality of circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process."[56] Equal access to and equal participation in the political process are critical components to any claim under amended section 2, which "does not separate vote dilution challenges from other challenges brought under the amended

[51] Chisom, 501 U.S. at 396.
[52] Id. at 398
[53] Id. at 397.
[54] Id.
[55] Houston Lawyers' Ass'n v. Attorney General of Texas, 501 U.S. 419, 425 (1991).
[56] Chisom, 501 U.S. at 397. See also Whitcomb v. Chavis, 403 U.S. 124, 153-55 (1971)(focusing on opportunity to participate in the political process not on substantive outcomes).

§2."[57]

In sum, *Chisom* holds that there is no freestanding, independent claim to vote dilution under revised VRA section 2. "Any abridgement of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election."[58] So, where there is an abridgement of the opportunity to participate – where members of a minority group are fenced out of the political process[59]–, that can trigger an adverse effect on the ability of minority voters to elect their choice of candidates in an election. But an essential part of a plaintiff's showing must be an access-based or process-based impairment of the opportunity to participate in the process, with that process-based impairment having an adverse effect on the ability of members of a minority group to elect representatives of choice. Abridgement of an opportunity for equal access to the political process is a necessary precondition or pre-requisite for a successful claim under section 2. Under *Chisom*, Section 2 is violated only if there is "racial inequality in terms of opportunity to participate in the political process and that foreclosure of opportunity results in (proximately causes) an inability to elect

[57] Houston Lawyers' Ass'n, 501 U.S. at 427.
[58] Chisom, 501 U.S. at 397.
[59] White v. Register, 412 U.S. 755, 768-69 (1973)(members of minority group were effectively denied "access to the political process" and "effectively excluded from political life")

representatives of one's choice."[60]

This type of causal interrelationship between, on the one hand, equal access to and participation in the political process and, on the other hand, electoral outcomes (vote dilution) must be present for "all [section 2] claims."[61] Abridgement of the opportunity to participate in the political process is a prerequisite showing for all successful section 2 claims. This point was recently reinforced by the Court in the *Brnovich* case, by both the majority opinion and by Justice Kagan's dissent.[62]

The *Allen* decision does not consider the effect of *Chisom* in channeling *Gingles*' analysis. Under *Chisom*, the problem of identifying a core value and the risk of developing a substantive, race-based entitlement – widely disavowed in the debates surrounding amended section 2 – are largely obviated. The vote dilution inquiry remains, but not as a freestanding, substantive principle. Vote dilution that results from racially discriminatory lack of access to the political process is actionable; but, reinforcing the principle that VRA section 2 targets race

[60] Blumstein, Racial Gerrymandering, at 575.

[61] Chisom, 501 U.S. at 398; Houston Lawyers' Ass'n, 501 U.S. at 427 (section 2 "does not separate vote dilution challenges from other challenges brought under the amended §2").

[62] Brnovich, 141 S. Ct. at 2337-38 (emphasizing section 2 "is violated only" when the "key requirement"" of an "open" political process is breached); id. at 2357-58 (Kagan, J., dissenting) (courts under section 2 "are to strike down voting rules that contribute to a racial disparity in the opportunity to vote" and that "a violation is established when, 'based on the totality of circumstances,' a State's electoral system is 'not equally open' to members of a racial group").

discrimination,[63] vote dilution is not a freestanding, standardless claim. A violation of section 2(b) depends upon a process-focused core value – a successful claimant must establish that members of a racial minority "have less opportunity than other members of the electorate to participate in the political process."[64] That was the "deal" contained in the Dole Compromise.

Interpreting section 2 in that way, as *Chisom* does, reduces the impetus for developing a substantive, race-based benchmark. Instead, the benchmark is process-oriented or access-oriented, focusing on opportunity, not outcomes unrelated to defects in process or access. Presaging the approach adopted in *Chisom*, this is how the analysis works:[65] "[A] plaintiff must demonstrate a causal relationship between specific 'objective' factors that evidence a faulty political process and the disadvantageous outcome."[66] That is, "to make out a prima facie case, a plaintiff should have to demonstrate foreclosure of the opportunity to participate in the political process, not merely an inability to influence or win an election or an inability to elect black officials."[67] If there is a nondiscriminatory and "open"

[63] Rogers v. Lodge, 458 U.S. 613, 622 (1982)(holding unconstitutional an at-large system that was "being maintained for the invidious purpose of diluting the voting strength of the black population").
[64] 52 U.S.C. §10301(b).
[65] The approach adopted in *Chisom* was essentially proposed in the immediate aftermath of the enactment of Dole Compromise. See Blumstein, Defining and Proving Race Discrimination at 704.
[66] Id.
[67] Id.

process, then racial minorities can be expected to participate on an equal footing in the rough-and-tumble political process, winning sometimes but not always as is the case for other groups and as recognized by the Supreme Court in the constitutional[68] and VRA contexts.[69] As the Supreme Court has stated,[70] in the absence of a race-based lack of opportunity to participate in the political process, "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground."[71]

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[68] Whitcomb v. Chavis, 403 U.S. 124, 153-55 (1971)(where there is equal opportunity to participate in the political process, there is no unconstitutional vote dilution).

[69] Johnson v. DeGrandy, 512 U.S. 997, 1016-17 (1994)(failure to maximize Black voters' political influence is not actionable as a violation of VRA section 2).

[70] The Supreme Court has recognized that, as a constitutional matter, claims of qualitative vote dilution are nonjusticiable because of a lack of standards. Rucho v. Common Cause, 139 S. Ct. 2484 (2019). The concerns that undergird *Rucho* correspond to the concerns about core values or benchmarks that surround claims under VRA section 2(b). The approach adopted in *Chisom* responds to these concerns by riveting attention on nondiscriminatory access to the political process and limiting vote dilution claims to circumstances where a plaintiff can demonstrate a lack of evenhanded access to the political process as in *Regester* and *Whitcomb*. An inability to elect representatives of choice is actionable, but only when linked to or traceable to an access-based deficiency. That reduces the impetus toward developing a theory of race-based representational entitlements, something that advocates of amended section 2, such as Sen. Dole, disavowed.

[71] Johnson v. DeGrandy, 512 U.S. at 1020. Eight years after *Gingles*, Justice Thomas (joined by Justice Scalia) sought to limit the scope of coverage of section 2. He would have interpreted the terms in section 2(a) – "standard, practice, or procedure"– so as to exclude from coverage "challenges to allegedly dilutive election methods that we have considered within the scope of the Act in the past." Holder v. Hall, 512 U.S. 874, 892 (1994)(Thomas, J., concurring in judgment). Justice Thomas called for "a systematic reassessment of our interpretation of §2" because of the "gloss" that caselaw had placed on the statutory text, which was "at odds with the terms of the statute and has proved utterly unworkable in practice." Id. As Justice O'Connor pointed out, "*stare decisis* concerns weigh heavily here," and she declined to accept Justice Thomas'

II. CONCLUSION

In the Louisiana case, the Court of Appeals should vacate the judgment of the District Court and remand for analysis under *Chisom*, requiring the parties to address whether there has been a lack of evenhanded opportunity to participate in the political process – a process-based question. Only if plaintiffs can carry this burden should the District Court examine the question of vote dilution, whether the race-based deficiencies in the opportunity to participate in the political process brought

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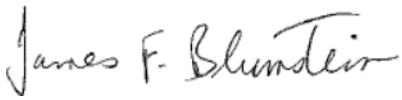
"suggestion that we overhaul our established reading of §2." Id. at 885-86 (O'Connor, J., concurring in part and concurring in the judgment). See also id. at 963-66 (Stevens, J., dissenting)(joined by Justices Blackmun, Souter, and Ginsburg and agreeing with Justice O'Connor on the statutory *stare decisis* point). Justice Thomas' position would have resulted in a categorical exclusion of vote dilution cases from coverage under section 2 – as not a "standard, practice, or procedure" covered under section 2(a). In this approach, Justice Thomas' categorical exclusion of coverage of vote dilution cases under section 2 extended beyond the restraints on *Gingles* applied in *Chisom*. Under *Chisom*, section 2 applies to vote dilution considerations, but not in a freestanding manner – only (i) when there is race discrimination that creates a lack of evenhanded opportunity for members of a racial minority group to participate in the political process and (ii) that lack of equal access results in a form of cognizable vote dilution. In *Allen*, the Court declined to engage in the type of "systematic reassessment" that Justice Thomas had called for in his *Holder* dissent. But in *Allen*, there was no need to engage in that type of broad-based reassessment – only to clarify the interrelationship of *Gingles* and *Chisom*, an issue that the Court in *Allen* did not recognize or address. Therefore, that issue is still open for consideration by lower courts in pending cases, such as in Alabama on remand or in Louisiana on appeal. What is called for is a clarification of the doctrine under amended VRA section 2 – the relationship between *Gingles* and *Chisom* --, not an undoing or redoing of existing doctrine. Ignoring or disregarding a clarifying precedent such as *Chisom* is not honoring *stare decisis*. *Cf.* Groff v. DeJoy, 143 S. Ct. 2279 (2023)(clarifying a statutory term that had long been mis-interpreted by lower courts based on imprecise language in a Supreme Court decision). There is considerable space for lower courts to demand consideration of *Chisom* and its relationship to *Gingles*.

about an inability to elect representatives of choice, under the totality of circumstances.

Respectfully submitted,



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8/9/2023

Certificate of Service

I hereby certify that on August 9, 2023, a copy of the foregoing Statemen/Brief of Professor James F. Blumstein as *Amicus Curiae* was mailed by first-class U.S. Mail, postage prepaid, and properly addressed to the following:

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